

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of)	MAIL STOP AF
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Ted Guidotti et al.)	Group Art Unit: 3761
)	
Application No.: 10/809,492)	Examiner: Melanie Jo Hand
)	
Filed: March 26, 2004)	Confirmation No.: 7892
)	
For: ABSORBENT ARTICLE)	
COMPRISING AN ABSORBENT)	
STRUCTURE)	
)	

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicants respectfully request review of the Final Rejection mailed January 22, 2009 in the above-identified application. No amendments are being filed with this request.

Claims 1-3, 5, 6, 9-18, 22, 23 and 26-29 are pending in this application.
Claims 1 and 16 are independent.

I. LINDSAY FAILS TO DISCLOSE, AND WOULD NOT HAVE RENDERED OBVIOUS, THE COMBINATION OF FEATURES RECITED IN INDEPENDENT CLAIMS 1 AND 16

The Office Action rejects independent claims 1 and 16 under 35 U.S.C. §103(a) over Lindsay et al. ("Lindsay"), U.S. Patent No. 6,613,955. The rejection is respectfully traversed.

Lindsay fails to disclose, and would not have rendered obvious, an absorbent article including, in combination with the other claimed features, (1) a first storage layer in a dry condition having a density exceeding 0.4 g/cm³, as recited in independent claim 1; and (2) that the first storage layer in the crotch portion of the absorbent structure has longitudinally extending apertures extending through an entire thickness of the first storage layer, as recited in independent claims 1 and 16.

With respect to (1), Lindsay's sanitary napkin 10 includes a central absorbent member 18 having an upper absorbent layer 36 and a lower absorbent layer 38 (see Fig. 1B and col. 12, lines 48-53). The Office Action asserts that the upper absorbent layer 36 corresponds to the claimed first storage layer and that the lower absorbent layer 38 corresponds to the claimed acquisition layer. Lindsay discloses that the lower absorbent layer 38 ("acquisition layer") has a density of greater than 0.1 g/cc, and that the upper absorbent layer 36 ("first storage layer") has a density of *less than 0.15 g/cc, and preferably less than 0.1 g/cc* (see col. 24, lines 48-52). The Office Action acknowledges that Lindsay fails to disclose that the upper absorbent layer 36 ("first storage layer") in a dry condition has the claimed density exceeding 0.4 g/cm³, but asserts that this feature would have been obvious in view Lindsay.

In particular, the Office Action calculates a density of the central absorbent member 18 (comprised of the upper absorbent layer 36 and the lower absorbent layer 38 together) of 0.007-12.5 g/cc by multiplying the combined basis weight of the upper absorbent layer 36 and the lower absorbent layer 38 by the thickness of the central absorbent member 18 (see page 5, lines 8-14 of the Office Action). The Office Action then asserts that Lindsay discloses the basis weight can be adjusted and optimized for particular purposes over a wide range, and thus it that would have been obvious to modify the central absorbent member 18 such that the upper absorbent layer 36 ("first storage layer") has a density of greater than 0.4 g/cm³ (see page 5, lines 14-16 of the Office Action). These assertions are unsupported by facts.

First, even if the basis weight of the central absorbent member 18 can be altered, such alteration would not have resulted in the upper absorbent layer 36 ("first storage layer") having a density of greater than 0.4 g/cm³. This is because Lindsay places an upper limit on the density of the upper absorbent layer 36 of 0.15 g/cc, as discussed above. On the other hand, the lower absorbent layer 38 only has a minimum density of 0.1 g/cc, as discussed above. Thus, any density of the central absorbent member 18 greater than 0.25 g/cc (i.e., 0.15 g/cc of the upper absorbent layer 36 + 0.1 g/cc of the lower absorbent layer 38) would be attributable to the lower absorbent layer 38, with a density of which Lindsay has not placed an upper limit.

Second, the Office Action asserts that it would have been obvious to modify the density of the upper absorbent layer 36 to be greater than the claimed 0.4 g/cm³

"to provide a core with a uniform predictable composition throughout to ensure proper performance of the absorbent structure" (see page 5, lines 18-19). This conclusory statement is insufficient to support an obviousness rejection, particularly taking into account the Patent Office's Examination Guidelines for Determining Obviousness Under 35 U.S.C. §103(a) in view of *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385 (2007). The Guidelines state that the Examiner should clearly articulate why the claimed invention would have been obvious. For example, the Supreme Court in *KSR* held that the Examiner "must [provide] some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness" (*KSR*, 82 USPQ2d 1385, 1396 (2007)). In this case, it is not at all apparent why a density of 0.4 g/cm³ for the upper absorbent layer 36 would "provide a core with a uniform predictable composition throughout" when Lindsay's disclosed density of 0.15 g/cc for the upper absorbent layer 36 already appears capable of providing a core with a uniform predictable composition throughout. Equally unclear is why or how the stated modification of greater than 0.4 g/cm³ would have "ensure[d] proper performance of the absorbent structure." The Office Action here fails to explain, with articulated reasoning or rational underpinning, why or how it would have been obvious to modify the central absorbent member 18 such that the upper absorbent layer 36 ("first storage layer") has a density of greater than 0.4 g/cm³, a modification that directly contradicts Lindsay's disclosed density for the upper absorbent layer 36. Thus, there is inadequate evidence supporting the conclusion that it would have been obvious to modify Lindsay's upper absorbent layer 36 ("first storage layer") in a dry condition to have a density exceeding 0.4 g/cm³ as recited in independent claim 1.

Thus, Lindsay fails to disclose, and would not have rendered obvious, an absorbent article including, in combination with the other claimed features, a first storage layer in a dry condition having a density exceeding 0.4 g/cm³ as recited in independent claim 1. Therefore, the rejection of independent claim 1 is improper for at least these reasons.

With respect to (2), Lindsay discloses that the upper absorbent layer 36 ("first storage layer") has crease lines 52 to promote downward folding (see Fig. 1B and col. 12, lines 53 and 54). Lindsay also discloses that the upper absorbent layer 36

may be apertured or slitted for improved flexibility (see col. 23, lines 58-60). The Office Action acknowledges that Lindsay fails to disclose that the upper absorbent layer 36 ("first storage layer") has longitudinally extending apertures extending through an entire thickness of the upper absorbent layer 36, but asserts that it would have been obvious to replace the crease lines 52 with the apertures to result in the claimed longitudinally extending apertures. However, such a modification would not have resulted in the claimed longitudinally extending apertures *extending through an entire thickness* of the upper absorbent layer 36.

In particular, the apertures disclosed by Lindsay simply improve flexibility of the upper absorbent layer 36, as discussed above. Thus, the purpose of replacing the crease lines 52 with the apertures would be to improve downward folding of the upper absorbent layer 36. There is not need for the apertures to penetrate all the way through the upper absorbent layer 36 to improve folding. It is therefore Applicants' position that the apertures disclosed by Lindsay do not *extend through an entire thickness* of the upper absorbent layer 36 and extend longitudinally. Indeed, if such was the case, the upper absorbent layer 36 would be cut in multiple pieces. In this regard, it can hardly be said that these pieces of the upper absorbent layer 36 are "folded" as desired by Lindsay. Should the Examiner's interpretation be maintained, the Examiner is respectfully requested to provide evidence that the apertures disclosed by Lindsay are configured to extend through an entire thickness of the upper absorbent layer 36.

Because the apertures disclosed by Lindsay simply improve flexibility of the upper absorbent layer 36, and do not extend through an entire thickness of the upper absorbent layer 36, the stated modification would not have resulted in a first storage layer in the crotch portion of the absorbent structure having longitudinally extending apertures extending through an entire thickness of the first storage layer, as recited in independent claims 1 and 16. Therefore, the rejection of independent claims 1 and 16 is improper for at least these reasons.

Thus, it is respectfully requested that the rejection of independent claims 1 and 16 be withdrawn.

II. **LINDSAY FAILS TO DISCLOSE, AND WOULD NOT HAVE RENDERED OBVIOUS, THE COMBINATION OF FEATURES RECITED IN THE DEPENDENT CLAIMS**

Because dependent claims 2, 3, 5, 6, 9-18, 22, 23 and 26-29 incorporate the features of independent claims 1 and 16, respectively, the rejections of these claims also are improper. Therefore, it is respectfully requested that the remaining rejections be withdrawn.

III. **CONCLUSION**

For all of the reasons discussed above, it is respectfully submitted that the rejections are in error and that all of the pending claims are in condition for allowance. Applicants respectfully request the panel of Examiners to review the January 22, 2009 Final Rejection prior to Appeal and to withdraw the rejections therein.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

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